

counsel; nor is there a showing that specific tax advice is being provided to a tax payer/client. Moreover, there is no showing any portion was created by a lawyer to memorializing his thoughts in reasonable anticipation of litigation. Rather the e-mails appear to discuss a firm policy regarding the development and promulgation of opinion letters. These are business related discussions in an attempt to establish a business policy. There is no showing that any of the three privileges are applicable. It is recommended that this document be produced.

**Document 1166 and 1167** are an exchange of e-mails between KPMG personnel including associate general counsel regarding a registration issue. Although one of the e-mails refers to attached correspondence from legal counsel, that attachment is not a part of this document nor is there any disclosure in any of the e-mails of the contents or summary of the contents of that correspondence. The e-mails merely discuss a business issue with tax related ramifications. The documents have not been shown to be privileged from disclosure by reason of the attorney client, work product or § 7525 privileges. They contain no tax advice to a tax payer, have not been created by a lawyer in reasonable anticipation of litigation and reveal no facts to a lawyer for the purpose of obtaining a legal opinion or advice. They discuss a business matter. It is recommended that these documents be produced.

**Document 1269 and 1293** are similar and consist of an exchange of e-mails regarding proposed changes to documents used in connection with the marketing of a business product. There is no showing that any facts were disclosed to legal counsel for the purpose of obtaining legal advice or opinion; nor is there any showing that specific tax advice was provided a tax payer and there is no showing that these e-mails were created by a lawyer. This is solely a discussion between KPMG members regarding a business matter and marketing documents. It is recommended that these documents be produced.

**Documents 1270 and 1271** are similar e-mails exchanges between KPMG personnel with attachments. The attachment to the e-mail is an engagement letter intended to be used to create a business relationship with firm clients. The e-mails specifically require that the attachment be used in all future deals with clients. No legal advice is solicited or given. Although created with the help of legal counsel the attached form was not intended to be a confidential communication but rather a KPMG template for the creation of a contractual relationship with third parties. Neither the e-mails or attachments provide tax advice to a tax payer nor have they been shown to memorialize a lawyer's thought process for use in reasonable anticipation of litigation. Therefore, none of the three claimed privileges has been shown to be applicable. It is recommended that these documents be produced.

### **The Attorney Client and Work Product Privileges**

The Special Master has examined the following documents for which the attorney client and work product privileges have been claimed and, under the applicable law, makes the following findings and recommendations.

**Documents 280 and 284.** These duplicate documents consist of a letter from a client to a law firm seeking advice on a legal matter. These clearly fall within the attorney client privilege. The work product privilege has not been shown to be applicable since there is no showing that these documents were created by a lawyer in reasonable objective anticipation of litigation. It is recommended that these documents need not be produced

**Document 282** is the same as Document 1142, a 25 page template legal opinion from a law firm. The log states that it was taken from the file of a named client. Although the spaces for a client's name and address are blank which support the conclusion that it is a template, the top of the first page of the document indicates it was found in a named client's file. Judge Hogan ruled that Document 1142 did "not fall under the attorney work product privilege, since there is no indication that it was prepared in anticipation of litigation". This was the only privilege asserted for Document 1142. Privilege Log, p 15 and Memorandum Opinion, Dec. 20, 2002, p.21. The same ruling applies to this document. However, unlike Document 1142, this document is also claimed to be subject

to the attorney client privilege. There has been a sufficient showing to conclude that legal advice is being furnished a named client by a lawyer on a legal matter. Although the opinion was prepared for ultimate disclosure to IRS in the event of an audit of the client's tax return, there is no showing that this occurred or that the attorney client privilege has been otherwise waived. It is recommended that this document need not be produced.

**Documents 305 and 328** are missing

**Document 336** is merely a transmittal letter. It contains nothing to bring it within the attorney client or work product privileges. It is recommended that it be produced.

**Document 522** is a letter from a client to a lawyer seeking a legal opinion on a legal matter. It has been shown to fall within the attorney client privilege. The work product privilege has not been shown to be applicable since there is no showing that it was created by a lawyer in reasonable anticipation of litigation. It is recommended that it need not be produced.

**Documents 523 and 524** are duplicate letters from a client to an attorney seeking legal advice on a legal matter. They have been shown to fall within the scope of the attorney client privilege. The work product privilege has not been shown to be applicable

since there is no showing they were prepared by a lawyer in reasonable anticipation of litigation. It is recommended that they need not be produced.

**Document 527** is a retainer agreement between a client and a lawyer. It does not contain any confidential information nor does it seek or render any legal advice or opinion. Moreover, it has not been shown to be subject to the work product privilege. It is recommended that it be produced.

**Document 563** is a letter from KPMG to a law firm regarding the contents of an opinion letter prepared by the latter. The underlying opinion letter (Document 442) was found by Judge Hogan to be subject to the attorney client privilege. This document is subject to the same privilege since it request a legal opinion regarding a tax matter concerning their mutual client. The work product privilege has not been shown to be applicable. It is recommended that it need not be produced.

**Document 565** is as the document itself states, a "model opinion address(ing) certain income tax issues..." although the privilege log states it came from the files of a named client, there is no showing in the document itself or in any of the initial or supplementary affidavits of various KPMG personnel that corroborates this allegation. In the absence of such an affirmation there is no showing that this form is privileged under the attorney client privilege. Nor has it been shown that this document was prepared in

reasonable anticipation of litigation. Instead, it appears that it served as a model furnishing documentation or support of a tax return in the event of audit. It is recommended that it be produced.

**Document 607** described in the privilege log as a letter from legal counsel to KPMG regarding a mutual client's tax matter. In a supplemental filing KPMG seeks to withdraw this document as non responsive to the summons. A review of the document supports this assertion. It is recommended that it need not be produced.

**Document 821** is a copy of a letter from a lawyer to a client providing legal advice in a legal proceeding. It has been shown to fall within the scope of the attorney client privilege. However, there is no showing that it was prepared in reasonable anticipation of litigation. Therefore, it has not been shown to be subject to the work product privilege. It is recommended that it need not be produced.

**Documents 1012 and 1137** are a series of e-mail exchanges. The privilege log describes these documents as involving communications with legal counsel regarding an engagement letter. While a KPMG member sought legal advice from house counsel regarding a legal matter, and was admonished for doing so, that communication is not part of these documents. However, counsel's response is a part of the documentation. It is dated 9/1/ 1998 @ 1:06PM. This e-mail from counsel has been shown to fall within the

attorney client privilege. However, the remainder of the documents discuss business matters and not attorney client privileged matters with the exception of the first sentence found in the penultimate paragraph of the e-mail dated 9/2/1998 @ 2:04PM. The work product privilege has not been shown to apply to any of these documents since only one of the e-mails was created by counsel and that has not been shown to have been made in reasonable anticipation of litigation. It is recommended that these documents be produced subject to the redaction of the 9/1/1998 e-mail from house counsel and the redaction of the first sentence of the penultimate paragraph of the e-mail of 9/2/1998 @ 2:04PM.

**Document 1048** is an e-mail from and to KPMG. The author, a non lawyer, discusses his views of a legal decision which he recently discussed with outside counsel. It is claimed to be privileged from production under the attorney client and work product privileges. There is no showing of an attorney client relationship between KPMG and the lawyer referred to in the e-mail. From a review of the many other documents it is clear that KPMG only had a business relationship with this lawyer and his firm in the marketing of a product. There is no showing that KPMG ever sought, as a client of the law firm, an opinion on law on its own behalf. The law firm furnished legal opinions to mutual clients of the firm and KPMG but not to KPMG itself as a client of the law firm. In short there has been no showing of an attorney client relationship between the law firm and KPMG. Therefore, the attorney client privilege has not been shown to be applicable. Nor has there

been any showing that this document was created by a lawyer in reasonable anticipation of litigation. It has only been shown to have been created by a KPMG member, a non lawyer. It is recommended that this document be produced.

**Document 1049.** This document is claimed to be a memorandum with an attached diagram memorializing a conversation with a lawyer. As with Document 1048 this document has not been shown to have arisen by reason of an attorney client relationship between the lawyer and KPMG. The discussion and diagram merely memorialize a business plan that has tax ramifications for their mutual clients. The document has not been shown to fall within the scope of the attorney client privilege. Nor has it been shown to be subject to the work product privilege since it was has not been shown to have been created by a lawyer in reasonable anticipation of litigation. It is recommended that it be produced.

**Document 1124** is a duplicate of Document 1136 found by Judge Hogan to be subject to the attorney client privilege but not the work product privilege. It is recommended that this document need not be produced.

**Documents 1125 and 1138** These e-mails and attachments are claimed to be protected from production under the attorney client and work product privileges. The e-mail is a communication from legal counsel in response to a request for legal advice or

assistance in a legal proceeding. The attachment is a document prepared by legal counsel in response to the request. This is more than business advice. It directly involves legal issues and matters. It has been shown to be privileged under both the attorney client and work product privileges. It is recommended that they need not be produced.

**Document 1133, 1149 and 1150** are essentially duplicate documents and sought to be privileged from production under the attorney client and work product privileges. Document 1133 consists of the draft of a client engagement letter and e-mails; Documents 1149 and 1150 only contain the e-mails. Associate general counsel were copied in on the e-mails and attached draft and their comments as well as opinion were specifically requested. The documents have been shown to be subject to the attorney client privilege. They have not been shown to be subject to the work product privilege. Document 1133 contains a draft of a proposed contract. There is no showing that litigation is anticipated. Contracts are written to preclude litigation, not in contemplation of litigation. There is nothing in the e-mails which shows they were written by a lawyer in anticipation of litigation so as to successfully invoke the work product privilege. It is recommended that the documents need not be produced.

**Documents 1139 and 1206** are duplicate e-mail exchanges between a KPMG member and in house legal counsel. There is a showing that these documents are subject to the attorney client and work product privileges. The e-mails provide legal advice or

assistance in a legal matter and document counsel's thoughts in anticipation of future litigation.. It is recommended that these documents need not be produced.

**Document 1168** contains the same e-mails found in Document 1150 as well as the draft client engagement letter found in Document 1133 plus six additional e-mails Five of the additional e-mails are between the same two KPMG members. The sixth e-mail copies in additional KPMG members including legal counsel. These six additional e-mails discuss business related matters. They contain no additional request for legal advice or assistance. Therefore, neither the attorney client privilege or work product privilege has been shown to be applicable to these six additional e-mails. (Pages FOP 036977 through the first half of FOP 036980). It is recommended that this document be produced subject, however, to the redaction of the e-mail material duplicate of Document 1150 and the draft engagement letter. (Pages bottom half of FOP 036980 through FOP 036986).

**Document 1192** is a series of e-mails some of which are duplicates of Document 1168 plus an additional six new e-mails The new e-mails have not been shown to be subject to the attorney client privilege or the work product privilege. It is recommended that this document be produced subject to the redaction of the bottom half of pages FOP 0367223 through FOP 037225. These are the same as pages, FOP 036980 through FOP 036986, found in Document 1168.

**Document 1193** contains most of the e-mails found in Document 1168 plus one new one. Nothing in the new e-mail makes it subject to either the attorney client or work product privileges. The remainder of page FOP 0337227 and pages FOP 037228 through FOP 037231 are the same pages recommended for redaction in Document 1168 (FOP 036980 through FOP 036986). It is recommended that this document be produced subject to the redaction of the bottom half of page FOP 037227 through FOP 037231.

**Document 1200** contains many of the same e-mails found in Document 1168. Only pages FOP 037285 through FOP 037286 which are duplicate of pages FOP 036980 through FOP 036982 of Document 1168 have been shown to be subject to the attorney client privilege. None have been shown to be subject to the work product privilege. It is recommended that this document be produced subject to the page redactions.

**Document 1206** is an exchange of e-mails between legal counsel and a KPMG member regarding a proposed agreement. The e-mails neither seek or contain legal advice or opinion. They deal solely with business matters and, in a generalized way, with legal norms including the need to be specific and the need to define the relationship between the various parties. There is an insufficient showing that this document is protected by the attorney-client privilege. Nor is there a showing that it was created by a lawyer in objectively reasonable anticipation of litigation so as to fall within the scope of the work product privilege. It is recommended that it be produced.

**Document 1208** is a further exchange of e-mails. The attachments referred to in the e-mails are not a part of this document and nothing in the e-mails themselves bring this document within the protection of either the attorney client privilege or the work product privilege. It is recommended that it be produced.

**Document 1210** is an exchange of e-mails to and from KPMG and in-house legal counsel. Specific facts are disclosed with a request for legal advice or opinion. In-house counsel provided a detailed response to an inquiry regarding a legal matter. There is no showing that the advice was sought for the purpose of committing a tort or crime. There has been a showing that this document is protected from disclosure by the attorney-client privilege. However, the only portion shown to have been created by a lawyer in reasonable anticipation of litigation is the e-mail of August 6, 1998 at 2:47PM (FOP 037358, 037354 and 037755). Those pages have been shown to fall within the scope of the work product privilege. The remainder of the document has not been shown to be subject to the work product privilege. It is recommended that this document need not be produced.

**Documents 1174, 1175, 1176, 1176A, 1176B, 1177, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257 and 1292** all deal with the same subject matter - the draft of an analysis of a tax issue. These document all consist of an exchange of emails and faxes between KPMG personnel to which are attached drafts and portions of a draft of an

analysis of a tax issue. The exchange culminates with the transmission of the final version of the draft analysis to legal counsel in the Office of General Counsel for the purpose of assisting in rendering legal advice. Viewed collectively, the respondent has shown that these documents are subject to the attorney client privilege. However, as the e-mails themselves disclose, they and the draft analysis were created by non lawyers. Therefore, it has not been shown that the documents fall within the scope of the work product privilege. It is recommended that these documents need not be produced.

**Document 1189.** This document consists of an exchange of e-mails between a KPMG member and the Office of General Counsel. In response to a specific request for legal advice on a legal matter, associate general counsel provided a legal opinion as well as the reasons for his opinion. KPMG has shown that this document is subject to the attorney client privilege. The document also reflects legal counsel's thought process; however, there is no indication that reasonably objective litigation was to be anticipated. Therefore, the work product privilege has not been shown to be applicable. It is recommended that the document need not be produced.

**Document 1243** is an exchange of e-mails claimed to be subject to the attorney client and work product privileges. It consists of three e-mails between KPMG members regarding a tax matter. The e-mail of Sept. 21, 1998 @ 6:11AM contains one sentence which memorializes legal advice from legal counsel regarding a tax matter. It is found in the fourth

sentence of the first paragraph beginning with the phrase "(w)e held in our position...". This sentence may be redacted since it contains legal advice. The remainder of the document has not been shown to fall within the attorney client nor the work product doctrine. It is recommended that it be produced in redacted form.

**Document 1244** is an e-mail from legal counsel to a KPMG member. The e-mail reports certain facts learned by counsel from another representative of KPMG. This e-mail provides no legal advice or assistance. It merely narrates a past happening. The affidavit of Larry DeLap contends that the "communications reflected in this document were had in anticipation of a dispute with IRS.. ". There is no showing that the dispute is reasonably likely to rise to the level of litigation. But more importantly, the e-mail does not reflect counsel's thought process or ideas. It merely reports a past event, therefore, it has not been shown to be protected by the work product privilege nor the attorney client privilege. It is recommended that it be produced.

**Document 1249** consists of a series of e-mails among KPMG members including the Office of General Counsel. Legal counsel provided legal advice on a legal issue (Docs 1189, 1203) in response to specific inquiries. This advice was transmitted to other KPMG members in response to their inquiries. KPMG has shown that this documents are subject to the attorney client privilege. However, there is no showing that counsel's email was created in

reasonable anticipation of litigation so as to be protected from disclosure under the work product privilege. It is recommended that these document need not be produced.

### **Documents Claimed To Be Subject To The Work Product And § 7525 Privileges**

The Special Master has examined the following documents for which the work product and § 7525 privileges are claimed and, under the applicable law, makes the following findings and recommendations.

**Document 1077** is described in the privilege log as an exchange of e-mails between KPMG members discussing potential causes of action accompanied by a form memorandum discussing tax advice. It is claimed to be privileged from production under the work product and § 7525 privileges. There is no showing of attorney involvement in the creation of the e-mails. Therefore, there is no showing that the work product privilege is applicable to them. Nor do the e-mails contain any tax advice to a tax payer client. They merely discuss a series of past events. The e-mails have not been shown to be protected from production by either the work product or § 7525 privileges. However, as stated in the log , a form memorandum is attached to the e-mails. Although a form, the affidavit of Jeffrey A. Eischeid says the form was prepared by house counsel as well as outside counsel. It does provide a format for advice to tax clients on tax matters and has been shown to be privileged under § 7525. It is

recommended that the email portion of this document be produced but that the attached form need not be produced.

**Document 1086 and 1087** are duplicates and consist of a draft letter memorializing a conversation between KPMG and its tax client. It contains certain tax advice by a tax preparer and has been shown to fall within the scope of § 7525. There is no showing that it was prepared by a lawyer in anticipation of litigation. Therefore, it has not been shown to be subject to the work product privilege. It is recommended that these documents need not be produced.

**Document 1165** is an exchange of e-mails among KPMG members together with an attachment. The attachment consists of a paragraph to be added as a footnote to all existing OPIS opinion letters. Judge Hogan ruled that the opinion letter itself (Document 45) was not privileged because it was prepared "in conjunction with (the) preparation of a tax return" Memorandum Opinion, Dec. 20, 2002, p. 14. There is nothing in this footnote or any of the affidavits that have been submitted that makes it subject to any different ruling under the claimed §7525 privilege. Nor do the e-mails themselves disclose any tax advice to a tax payer. Therefore, there has been no showing that this document falls within the protection of § 7525. Moreover, there has been no showing that this document was created in whole or part by a lawyer in reasonable anticipation of litigation. Therefore, there is no showing that the work product privilege is applicable. It is recommended that this document be produced.

### **Documents Claimed To Be Subject To The Attorney Client and § 7525 Privileges**

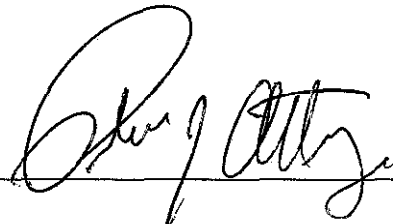
The Special Master has examined the following documents for which the attorney client and § 7525 privileges are claimed and, under the applicable law, makes the following findings and recommendations.

**Documents 370 and 371** are duplicate copies of a retainer agreement between a client and a lawyer. The document contains no legal or tax advice, assistance or opinion. It merely lists the costs associated with the preparation of a document. There has been no showing that either the attorney client or § 7525 privileges are applicable. It is recommended they be produced.

**Document 871** is a covering letter from a lawyer to KPMG regarding a mutual client. The letter contains no legal or tax advice or opinion. It is apparent another document was enclosed but the enclosure is not a part of this document. This document as it exists has not been shown to be subject to either the attorney client or § 7525 privileges. It is recommended that this document be produced.

**Document 1197** is an exchange of e-mails between KPMG members regarding the terms of an engagement letter. Although house counsel is copied in on the response e-mail, no legal advice or opinion appears to have been sought or provided. The issue presented in the e-mails concerned a business decision and was resolved in the response e-mail. John S. Bauman, formerly with the KPMG Office of General Counsel, states in his affidavit that he "understood" that by copying him in on the response e-mail, the sender was requesting his legal opinion on the views he was expressing so as to make this document privileged. However, a fair reading of the e-mail does not support that conclusion. The copying in appears to be for informational purposes only. The business decision disclosed in the response e-mail is definitive, not contingent. Nor can the e-mail reasonably be said to contain tax advice to a tax client. The first e-mail states "(A) prospective client" not an existing client "asks two questions". The questions had to do with the terms of the engagement letter, not tax advice. Attempts were made to negotiate the terms and conditions of a contract and the reply e-mail resolved those issues. Neither the attorney client nor the § 7525 privileges have been shown to be applicable. It is recommended that the document be produced.

October 8, 2003

A handwritten signature in black ink, appearing to read 'Patrick J. Attridge', is written over a horizontal line.

Patrick J. Attridge  
Special Master